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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 665

ANGELO HERNDON, *Appellant*

vs.

THE STATE OF GEORGIA, *Appellee*

BRIEF FOR THE APPELLEE

STATEMENT

This is an appeal from a decision of the Supreme Court of Georgia affirming a conviction of the appellant for the offense of "attempt to incite insurrection." The original opinion of the Supreme Court of Georgia is reported in 178 Ga. 832. (R., 141-179). Its opinion upon the denial of the petition for rehearing is reported in 179 Ga. 597. (R., 192-199).

The appeal was granted ex parte by the chief justice of the Supreme Court of Georgia and was filed in the Supreme Court of the United States Jan. 24, 1935. The Journal of the Court for Feb. 11, 1935, recites that "further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on the merits."

We shall therefore discuss first the jurisdictional question and then discuss the questions which appellant seeks to raise in this appeal.

The facts which we consider necessary to a consideration of the jurisdictional question are as follows: (We leave to a later part of this brief a statement of further facts and the evidence necessary to a consideration of the points advanced in the appeal.)

Appellant was indicted by the grand jury of Fulton county, Georgia, for a violation of Sec. 56 of the Penal Code of Georgia. (R., 5-9), which section provides:

> "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."

The indictment was returned July 22, 1932 (R., 9). On Jan. 16, 1933, before trial, Herndon filed a "motion to quash the indictment" (R., 9-10), upon four grounds, one of which was as follows:

> "4. That the statute upon which said unlawful indictment is based is in direct violation of the Constitution of the State of Georgia, paragraph 15, article 1, and of the Constitution of the United States."

This motion to quash the indictment was overruled by the trial judge on Jan. 16, 1933 (R., 10), before the trial. The verdict of conviction was rendered Jan. 18, 1933 (R., 9.)

(In appellant's brief we find no mention of this motion to quash the indictment for alleged unconstitutionality of the statute. It has an important bearing, however, upon the question as to whether the constitutional complaint later

presented in the motion for rehearing was seasonably presented or not.)

Following his conviction, Herndon filed a motion for new trial and later amended it with many special grounds. The motion for new trial was overruled July 5, 1933 (R., 40-41). A bill of exceptions was presented and certified by the trial judge on July 12, 1933 (R. 1-4). In this bill of exceptions Herndon assigned error upon the overruling of his motion for new trial, and also recited that he assigned error upon the overruling of his three preliminary pleadings, including his motion to quash the indictment.

On May 24, 1934, the decision of the Supreme Court of Georgia was rendered, affirming the conviction. (R., 141-

The Supreme Court of Georgia declared that the rulings upon the preliminary pleadings were not properly before it, because no exceptions to these rulings (nor exceptions pendente lite) had been filed within the time allowed by law. The decision considered various special grounds of the motion for new trial, holding that they were without merit, and also discussed the evidence at considerable length and held that the evidence was sufficient to authorize the conviction.

Thereafter, on August 20, 1934, counsel for appellant filed in the Supreme Court of Georgia a motion for rehearing, in which *the contention was again made that the Georgia statute in question violated the federal constitution.* This time the contention was presented in greater detail. The motion contended (R., 190) that the statute was "repugnant to the due process clause of the Fourteenth Amendment to the Federal Constitution." The motion then sought to give an excuse for not presenting this specific contention earlier. It was contended that the state supreme court had construed the statute differently from the trial judge's construction, and that this fact gave the movant the right to present the constitutional question as now advanced in the motion for rehearing for the first time. Movant also declared in the motion that he *could* not have presented earlier this contention that the statute violated the due process clause of the

federal constitution (thus ignoring the fact that he had contended in his "motion to quash the indictment" that the statute violated both the Georgia and the Federal constitutions.)

On Sept. 28, 1934, the Supreme Court of Georgia denied the motion for rehearing, (R., 192-199), 179 Ga. 597. The court did not pass upon the question of alleged unconstitutionality of the statute. With reference to this point, the opinion on denying the motion for rehearing calls attention to the fact that the Supreme Court of Georgia is a court "alone for the correction of errors" in inferior courts, and that the Supreme Court of Georgia *"would in no event have jurisdiction* to consider the merits of any question which is either intentionally or unintentionally omitted in the trial court." (See page 601 of 179 Ga.) (R., 197). The headnote by the Court on this point was as follows: (R., 192.)

> "2. This court will not pass upon the constitutionality of an act of the General Assembly unless it clearly appears in the record that the point was directly and properly made in the court below and distinctly passed on by the trial judge."

Following the rendition of the above decision, appellant presented a petition for appeal (R., 201) assigning error on the *failure* of the Supreme Court of Georgia to decide the question as to the constitutionality of Section 56 of the Penal Code of Georgia (assignments 1 to 4), and upon the *failure* of the court to hold that Section 56 was unconstitutional, etc. (assignments 12 to 20). Appellant included in his assignments, however, some paragraphs assigning error on the purported ground that the state supreme court had held that Section 56 was not unconstitutional (assignments 5 to 10, R. 202), *when in fact the State Supreme Court made no such ruling whatever.* Now, in the brief filed by appellant in the Supreme Court of the United States, he abandons the assignments first above referred to (assignments 1 to 4, and 12 to 20), upon the recital of which he obtained the state chief justice's allowance of the appeal, and recites in his brief that he relies upon the other assignments (which

were assignments 5 to 10), *thus seeking to submit to the United States Supreme Court questions which were not even decided by the state supreme court.* (See p. 9-10 of appellant's brief.)

SUMMARY OF ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED, FOR LACK OF JURISDICTION, BECAUSE THE FEDERAL CLAIM NOW MADE WAS NOT SEASONABLY PRESENTED IN THE STATE COURTS, AND HAS NOT BEEN PASSED UPON BY THE STATE SUPREME COURT.

In this division of our brief we point out that the Supreme Court of Georgia was without jurisdiction to decide the federal constitutional question which appellant attempted to raise in the motion for rehearing. This is based upon the provisions of the Constitution of Georgia and many decisions applying it.

To give the Supreme Court of the United States jurisdiction of an appeal from a state court it must appear affirmatively that a Federal question was seasonably presented in the state court and actually decided by the highest court of the state having jurisdiction or that the judgment as rendered could not have been given without deciding it.

It is too late to raise a Federal question for the first time in a petition for rehearing in a state supreme court after that court has pronounced its final decision.

While there are a few exceptions to the general rule that a Federal question cannot be raised for the first time in a petition for rehearing in a state supreme court, this case does not come under any of the exceptions.

The decision of the Georgia supreme court in construing this statute was not such "unanticipated ruling" as would nullify the foregoing rule in this instance.

The decision of the Georgia supreme court in construing

this statute was not at variance with any construction formerly adopted by it, but was in line with previous expressions of that court.

Cases cited by appellant on the jurisdictional question are discussed and distinguished.

Federal cases hold that the proper time to raise a Federal question is in the trial court whenever that is required by the State practice.

Appellant could have raised the present federal question in the trial court, as illustrated by the fact that he did in fact present there a motion to quash on ground of alleged unconstitutionality of the statute, which contention was lost to him (a) by being too vague and (b) by not being preserved by timely exceptions.

Motion to quash the indictment, or demurrer, was the proper way to attack the constitutionality of the statute under which appellant was indicted.

II.

GEORGIA'S STATUTE ON "ATTEMPT TO INCITE INSURRECTION," AS CONSTRUED, DOES NOT VIOLATE THE "DUE PROCESS CLAUSE" OF THE FOURTEENTH AMENDMENT BY UNLAWFULLY INFRINGING LIBERTY OF SPEECH OR ASSEMBLY.

Utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the police power of the legislature.

Section 56 of the Georgia code is not one making any particular utterance criminal, but it penalizes the use of any language when used under such circumstances and with such intent as to constitute an actual attempt to incite an insurrection. The imminence of the planned insurrection is not a necessary element.

"Dangerous tendency" is the test applied in many federal and state decisions, in deciding whether the penalizing of cer-

tain language amounted to unconstitutional abridgement of freedom of speech.

"Clear and present danger," as a test, has not been followed by the line of federal decisions.

III.

THE GEORGIA STATUTE, AS CONSTRUED, IS SUFFICIENTLY DEFINITE AND CERTAIN.

The statute definitely informs a person that he must not attempt to incite others to combined resistance by force to the lawful authority of the State, when he intends that such force shall come at some time as a direct result of his influence upon those whom he attempts to incite.

Supreme Court has upheld a statute penalizing the printing of an article that tends to encourage or incite the commission of crime or acts of violence, or which tends to encourage or advocate disrespect for law. *Fox v. Washington*, 236 U. S. 273.

Georgia statute is more definite than the California statute which was upheld against contention of unconstitutionality for vagueness in *Whitney v. California*, 274 U. S. 357, 368.

Other state decisions cited have upheld criminal syndicalism statutes against this contention,—some less specific than the California statute.

IV.

THE GEORGIA STATUTE, AS APPLIED IN THIS CASE, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Herndon was shown to have come to Atlanta as a paid organizer for the communist party. He was engaged in working up an organization for the party in Atlanta, had actually obtained some members, had called and conducted some meetings in the interest of furthering the organization,

had seized upon a condition of unemployment and unrest to call forth and produce a mass demonstration of unemployed people, white and colored, demanding increased appropriations for "relief" from county authorities, this not being done through any interest in helping such unemployed persons but merely as a means to an end, to-wit: furthering the organization of the communist party which he was paid to organize.

When arrested he had in a box under his arm nine membership books in the communist party and a number of pamphlets and booklets which set forth the aims and plans of the communist party. The membership books set forth the conditions upon which members were accepted and the agreements that the members made upon joining the party, among these being the agreement to "accept the program and statutes of the Communist International and the Communist Party of the U. S. A." and the agreement that the members would subordinate themselves "to all decisions of the comintern and of the party" (the comintern being shown by the literature to be the executive committee of the party). The authenticity of the literature was proven and was effectually admitted by the defendant.

One of the documents thus found in the defendant's possession was a booklet entitled *"The Communist Position on the Negro Question,"* which explained in detail the meaning of the communist slogan: *"Self-Determination for the Black Belt"* (which slogan appeared in the title lines of the communist daily newspaper put in evidence and in the numerous other communist certificates and pamphlets). This slogan was declared in above booklet to represent the aim, purpose and demand of the communist party in the southern states, and was shown to include the following:

1st—That all land owned by the "southern white landlords" in this black belt be confiscated and turned over to the negroes.

2nd—That the present state boundaries, established for the convenience of the "white master class," be broken up and the state unity of the black belt established.

3rd—That in this black belt the negroes be given the com-

plete right of self-determination; *the right to set up their own government,* and the right to separate from the United States, if they wish.

This booklet had a map on the outside, showing that this so-called black belt extended through portions of Arkansas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina and Virginia. (See document 13, R. 102, for photographic reproduction of this map.)

The booklet also contained resolutions adopted by the Communist International ordering the Communist party of the U. S. A. to adopt the above plan of "self-determination of the negroes in the black belt" as a program in the southern states. These resolutions declared that the party members should not limit themselves to propaganda for the "right of self-determination" but should *"orgunize mass actions such as demonstrations, strikes, tax boycott movements, etc."* The resolutions teemed with such words as "revolution" and "revolutionary," and said that this was a slogan of "national rebellion."

The resolutions closed with the declaration that the constant call of the communists to the negro masses must be: *"Revolutionary struggle against the ryling white bourgeoisie, through a fighting alliance with the revolutionary white proletariat."*

Other portions of the booklet, and other documents in the evidence, showed that the American communist party was obeying the orders thus given it by the Communist International and was actively trying to incite the negroes in the south to accomplish the above stated aims.

The literature contained also the usual and better known communist principles and slogans, such as: "Against capitalist terror"; "For the defense of the Soviet Union"; "The communist party incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism."

One of the pamphlets was a publication of the "Young Communist League" containing such incitements as *"Smash the National Guard, the C. M. T. C. and R. O. T. C."*

(All of the documents placed in evidence and above referred to were found in the box under Herndon's arm when he was arrested. R., 92. Some other documents and bundles of papers were referred to in testimony as being found in his room, but these were not actually introduced in evidence, as the record shows.)

(The above is far from complete as a summary. The outline contained under division IV of this brief will give a better idea of the evidence. The transcript of the record, from R. 56 to 125, gives a complete view.)

We submit that the evidence in this case shows that Herndon was actually engaged in attempting to incite an insurrection, as defined and penalized by the Georgia statute, since he was actively engaged in organizing a branch of the communist party in Atlanta, and since the "party" was shown definitely by its authentic literature to advocate the forceful overthrow of the lawful authority of the State by revolution or rebellion, the seizure of all land in the black belt belonging to white people, the abolition of the present state borders and the setting up of a new state or nation out of parts of Georgia and other states with sole control by negroes.

Appellant's argument that it is possible to imply only a peaceful meaning to such words as "revolution," "rebellion," "mass action," "tax boycott movements," "violence," "confiscation," and "revolutionary," is answered by citing the Fish Committee Report to the 71st Congress, House of Representatives Document 2290, Jan. 17, 1931, "Lenin's Complete Works," and Karl Marx' Manifesto of the Communist Party, all showing that the intent of the communists is not peaceful but forcible overthrow of governments.

Cases cited by appellant in this connection discussed and distinguished.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED, FOR LACK OF JURISDICTION, BECAUSE THE FEDERAL CLAIM NOW MADE WAS NOT SEASONABLY PRESENTED IN THE STATE COURTS, AND HAS NOT BEEN PASSED UPON BY THE STATE SUPREME COURT.

Ground No. 4 of the motion to quash the indictment, which was presented to the trial court, raised in a proper manner the contention that the statute under which Herndon was indicted violated the Constitution of Georgia; it specified the section of the Georgia constitution which the defendant claimed was violated by the statute. But as to the question of violating the Federal constitution, the motion to quash was insufficient because it did not specify any particular provision or section of the Federal constitution. *Cox v. Texas*, 202 U. S. 446 (3), (4); *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 118; *Dewey v. City of Des Moines*, 173 U. S. 193 (2), 199.

This rule applies not only in Federal procedure but in Georgia procedure. *Griggs v. State*, 130 Ga. 16.

The motion to quash the indictment for alleged unconstitutionality of the statute upon which the indictment was founded was equivalent to a demurrer to the indictment on that ground [*Thomasson v. State*, 22 Ga. 499 (1)], and was therefore a proper vehicle for raising the question of alleged unconstitutionality of the statute. *Boswell v. State*, 114 Ga. 40 (2).

If the motion to quash the indictment had been definite in alleging that the statute violated some specific provision of the Federal constitution, and if such contention had been then passed upon by the trial judge, preserved by timely exceptions, and finally passed upon by the state supreme court, then the Federal question could have been brought to the United States Supreme Court for review.

But in addition to the indefiniteness of the Federal complaint in the trial court, the overruling of the motion to quash the indictment was not properly preserved by exceptions (or exceptions pendente lite) within the time limit allowed by the Georgia laws, and therefore the Supreme Court of Georgia held that the ruling upon the motion to quash the indictment was not properly before it for review. (R., 141, 145.)

Of course the state laws on procedure, when not themselves violative of the Federal constitution, are given full recognition by the Federal courts.

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal constitution." *Brown* v. *New Jersey*, 175 U. S. 172, 175. See also *Twining* v. *New Jersey*, 211 U. S. 78; *Hurtado* v. *California*, 110 U. S. 516; *Frank* v. *Mangum*, 237 U. S. 309 (2), 326; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308.

STATE SUPREME COURT WAS WITHOUT JURISDICTION TO DECIDE CONSTITUTIONAL QUESTION NOT PROPERLY RAISED IN LOWER COURT

Therefore, when the appellant presented in his motion for rehearing in the Supreme Court of Georgia the contention that Section 56 of the Georgia Penal Code was violative of the "due process clause" of the Fourteenth Amendment to the Federal constitution, the Supreme Court of Georgia properly held that this question had not been presented in the trial court and hence was not within the jurisdiction of the Supreme Court for review. Article 6, section 2, paragraph 5, of the Constitution of Georgia, provides:

> "The Supreme Court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, and such other like

courts as have been or may hereafter be established in other cities. . . ."

In *Dunaway vs. Gore*, 164 Ga. 219 (4), 230, the Supreme Court of Georgia cited the above constitutional provision and declared: "Indeed, it may be said that under the provision of our constitution, art. 6, sec. 2, par. 5 (Code, §6502), which provides that the Supreme Court shall be a court alone for the correction of errors, that this court would in no event have jurisdiction to consider the merits of any question which is either intentionally or unintentionally omitted in the trial court."

In *Griggs vs. State*, 126 Ga. 442 (2), it was held: "The constitutionality of a statute can not be questioned in this court when it does not appear that such question was made in the lower court."

In *Hutchings v. Roquemore*, 164 Ga. 637 (2), the Supreme Court of Georgia, in refusing to pass upon a constitutional question first raised in the bill of exceptions, referred to the fact that it was "without jurisdiction" to pass upon the constitutional question since it was not presented to the lower court for decision first.

In *Patterson vs. Bank of Alapaha*, 148 Ga. 356, the Court declared: "We are of the opinion that the Supreme Court has no jurisdiction of this case," because it appeared from inspection of the record that the constitutional question sought to be raised had not been first presented in the trial court.

The principle has been applied repeatedly, in criminal as well as civil cases. See also: *Brown vs. State*, 114 Ga. 60 (2); *Griggs vs. State*, 130 Ga. 16; *Moore vs. State*, 126 Ga. 414 (1-a); *Mays vs. State*, 175 Ga. 260.

Therefore, we may take it as thoroughly established under the Georgia procedure, decisions and state constitution, that when a person is convicted of violating a Georgia statute and carries his case by bill of exceptions to the Supreme Court of Georgia, the latter court has no jurisdiction to decide the constitutionality of the statute involved unless the specific constitutional question was raised in the trial court and a

decision there invoked upon the question, and the point preserved by timely exceptions.

Since the record in the present case clearly shows that no specific Federal constitutional question was raised in the trial court, and that the Supreme Court of Georgia did not decide the constitutional question made in the motion for rehearing because of lack of jurisdiction, as set forth in the foregoing decisions, it follows that the present appeal should be dismissed by the Supreme Court of the United States, under the authority of the following cases:

U. S. SUPREME COURT DECISIONS REQUIRING DISMISSAL

In *California Powder Works v. Davis*, 151 U. S. 389, 393, it was held: "It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

In *Whitney vs. California*, 274 U. S. 357, 360, it was declared: "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court." (citing:)

Crowell v. Randell, 10 Pet. 367, 392;

Railroad Co. v. Rock, 4 Wall. 177, 180;

Hiawassee Power Co. v. Carolina-Tenn. Co., 252 U. S. 341, 343;

Cincinnati Railway v. Slade, 216 U. S. 78, 83;

New York v. Kleinert, 268 U. S. 646, 650.

In the *Hiawassee Power Company* case, supra, Justice Brandeis said (page 343 of decision) that "the basis for a review by this court is wholly lacking here," because in the assignment of errors which carried the case to the State supreme court no mention was made of any Federal constitutional point and there was in fact no decision by the State supreme court upon the subject, although the plaintiff in-error had raised the Federal constitutional point in presenting an objection to evidence in the trial court.

In *Barrington vs. Missouri*, 205 U. S. 483, (an appeal from a murder conviction in state court), it was held that a claim for constitutional protection from the admission of testimony procured by the sweat-box method, raised for the first time in a petition to the state supreme court for a rehearing, comes too late to sustain the appellate jurisdiction of the Federal Supreme Court over the State court.

In *McCorquodale vs. Texas*, 211 U. S. 432, in dismissing a writ of error from the Texas court in a murder conviction, in which the appellant had sought to raise a Federal constitutional question for the first time in the motion for rehearing in the state appellate court, the Court said: "This court has decided many times that it is to late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision." (citing:) *Loeber v. Schroeder*, 149 U. S. 580, 585; *Pim v. St. Louis*, 165 U. S. 273.

In *Bowe v. Scott*, 233 U. S. 658, (where the writ of error was dismissed for want of jurisdiction), it was held that a contention involving constitutional rights, made in a petition for rehearing after judgment in the lower court had been affirmed, was raised too late to give the Federal Supreme Court jurisdiction to review the case unless the state court considered and passed upon the Federal question therein relied upon.

The latter part of the above ruling, while presenting an exception to the general rule stated in the preceding decisions, has no application to the present case, as the Georgia Su-

preme Court *did not* consider and pass upon the Federal question first raised in the motion for rehearing,—holding that it was without jurisdiction to pass upon the question when raised at that stage of the proceedings.

DECISION OF GA. SUPREME COURT NOT SUCH "UNANTICIPATED RULING" AS WOULD NULLIFY THE FOREGOING RULE IN THIS INSTANCE

As we gather the contention of appellant on this jurisdictional question, he admits the existence of the foregoing established rule against the initial raising of a Federal constitutional question in a motion for rehearing in a state court. He contends, however, that although that rule may apply generally it does not apply in this case. He points out that the Supreme Court of Georgia in his decision, (*Herndon v. State*, 178 Ga. 832) placed a construction upon the statute he was charged with violating (section 55) that was different from a construction placed by the trial judge in a quoted extract of his charge to the jury. He claims, therefore, that he could not have anticipated this construction by the State supreme court and hence could not have raised in the trial court the question of the constitutionality of the statute.

The principal fallacy in this argument lies in the fact that appellant not only *could* have raised the Federal constitutional attack upon the statute in the trial court, but *did actually* attempt to do so, by filing a motion to quash the indictment, attacking the indictment as violative of the Federal constitution in language which we have shown was too vague and indefinite to properly raise the question, and not presenting the specific contention that the statute violated the due process clause of the Fourteenth Amendment.

Thus it is totally incorrect to argue that the judge's charge to the jury (which came at the close of the trial) was responsible for the failure of the defendant to advance in the trial court the constitutional complaint against the statute which he later presented in the motion for rehearing. The

charge had not been delivered when the time for demurring to the indictment or moving to quash it was at hand.

No adequate reason is given as to why Herndon did not raise in the lower court, by demurrer or motion to quash the alleged unconstitutionality of the statute under the "due process clause" of the Fourteenth Amendment. There was nothing to prevent him, if he had so desired. As said by the Supreme Court of Georgia in denying the motion for rehearing in Herndon's case:

> "Regardless of the construction placed upon this statute either by the trial court or by this court, the defendant could have presented to the court below the construction which he deemed to be the proper one and in connection therewith could have attacked the statute upon any chosen constitutional ground."

This case is easily distinguishable from the decision in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1), where the Court held: "A Federal question raised for the first time on petition for rehearing in the highest court of the state is raised in time, where it is presented by a construction placed upon a statute by such court in its decision, *at variance with a construction formerly adopted by it.*" No such situation is presented here. No former decision of the Georgia supreme court is in conflict with the decision here complained of. Appellant points out no decision of the Georgia supreme court conflicting even in spirit with the decision in Herndon's case. And the fact is the Herndon decision is *in line with* the previous expressions of the Georgia Supreme Court.

HERNDON DECISION IN LINE WITH PREVIOUS EXPRESSIONS OF GEORGIA SUPREME COURT

In *Carr vs. State*, 176 Ga. 747, the Supreme Court of Georgia had up for decision the constitutionality of this same statute. Carr was indicted in 1932 for violating the same statute that Herndon was convicted of violating, section 56

of the penal code of Georgia. Carr filed a demurrer to the indictment in which he contended, among other things, that said statute is violative of the section of the constitution of Georgia which has reference to the guarantee of liberty of speech and of the press, and also violative of the "due process clause" of the 14th Amendment to the constitution of the United States.

In deciding against this contention and upholding the constitutionality of the statute, the Georgia Supreme Court quoted the following language from an earlier case:

> "It (the State) can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace *or imminent and immediate danger of its own destruction.* 'Manifestly the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, *without waiting until there is a present and imminent danger of the success of the plan advocated.*'" (176 Ga. 750.)

The earlier case where above language also appears is *Carr v. State*, 176 Ga. 55, 60.

Thus it is seen that the Georgia Supreme Court, in construing and passing upon the constitutionality of the same statute that Herndon now attacks, adopted language so similar to the language used in the Herndon decision that it cannot reasonably be contended that there is any conflict or variance between the two decisions.

Every trial lawyer and judge knows that in the trial of criminal cases "requests to charge" are often presented which the judge believes express the law more favorably to the defendant than he is entitled to, and yet the trial judge sometimes accedes to the request and gives the charge as requested, merely out of an abundance of precaution.

Since the trial judge in Herndon's case included in his charge the statement that "in order to convict the defendant, gentlemen, it must appear clearly by the evidence that imme-

diate serious violence against the State of Georgia was to be expected or advocated," which was more favorable to the defendant than he was entitled to, under the Georgia statute and decisions, we may reasonably conclude that the judge was merely acceding to the request to so charge, out of an abundance of precaution exercised in the defendant's favor.

The defendant's written "requests to charge" are embodied in the record (R., 137-138), showing that the extracts in question got into the judge's charge by special request. (In Georgia the State has no appeal from an error committed in favor of a defendant in a criminal trial. *State v. B'Gos*, 175 Ga. 627, 630, and citations.)

OTHER CASES CITED BY APPELLANT DISTINGUISHED

Appellant cites, on page 61 of his brief, *Missouri ex rel. v. Gehner*, 281 U. S. 313. But in this case the lower judicatory, the state board of tax equalization, had decided that a certain statute of the State of Missouri, §6386, was unconstitutional and void, whereupon the Missouri supreme court came along and held the section valid. The relator, who had become the appellant, then filed a motion for rehearing in which the contention was made that the statute, §6386, was violative of the Federal constitution in certain respects. The motion for rehearing was denied, without reference to the Federal questions raised therein. An appeal was then allowed and considered by the Supreme Court of the United States. In assuming jurisdiction of the appeal the decision says: (p. 320.)

> "1. It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. *Citizens Nat. Bank vs. Durr*, 257 U. S. 99, 106. But here the company, at the first opportunity, invoked the protection of the Federal Constitution and statute. *It could not earlier have assailed*

the section as violative of the Constitution and laws of the United States."

The italicized portion above (italics ours) is of the very gist of the decision. Manifestly the decision is no precedent for the present appeal unless it may likewise be said, of Herndon: "he could not earlier have assailed the section as violative of the Constitution and laws of the United States." This cannot be said in the present case, because without doubt Herndon could have filed through his counsel a demurrer or motion to quash, assailing the statute under which he was indicted as violative of the due process clause of the Fourteenth Amendment.

Another case cited by appellant in his brief is *American Surety Company vs. Baldwin*, 287 U. S. 156. This was evidently cited for some bits of language embodied in the opinion. But if the ruling itself is considered it will be found to support squarely the position of appellee on the jurisdictional question in this case. The headnotes of the *American Surety Company* case are:

1. "A writ of certiorari to review a judgment of a state court will be dismissed where the Federal claim was not seasonably made in the state court.

2. "A claim that a judgment of a state court is void under the due process clause of the Fourteenth Amendment as having been entered without notice and opportunity to be heard is not seasonably made, so as to serve for a basis of review in the Supreme Court of the United States, where first raised by a *petition for rehearing* of an appeal to the highest court of the state from an order of a lower court setting aside the judgment, the claim of want of notice having previously been raised throughout the proceedings solely as a matter of state law."

The decision, pages 163-164, says:

"The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous

contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. *The Federal claim there made cannot serve as the basis for review by this court.* The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. *There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment.*"

Following are the extracts from this decision for the benefit of which the present appellant apparently cites the *American Surety Company* case:

"This is not a case where, as in *Saunders v. Shaw*, 244 U. S. 317, 320, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the State Supreme Court. . . .

"Nor is the federal claim based, as in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 678, upon the unanticipated act of the State Supreme Court in giving to a statute a new construction which threatened rights under the Constitution."

By the expression "giving to a statute a *new* construction," the Supreme Court of course meant a construction *"at variance with a construction formerly adopted by it."* (See discussion of the *Brinkerhoff-Faris* case, supra). As previously pointed out in connection with our discussion of that case, it cannot be contended that the Georgia Supreme Court's decision in the *Herndon* case is "at variance" with any previous construction of the statute by the Georgia Supreme Court.

By inspecting *Saunders vs. Shaw*, 244 U. S. 317, (referred to in above extract from the *American Surety Company* case), we may see what the Supreme Court meant by an "unantici-

pated disposition of the case at the close of the proceedings in the state supreme court." The appellant (originally the intervenor) had objected to certain evidence tendered by the plaintiff in the trial court, and the trial judge had sustained the objection. The intervenor won the case in the trial court. The original plaintiff then appealed to the state supreme court and assigned error upon the above mentioned ruling. The state supreme court first affirmed the judgment, and then upon granting a rehearing reversed its position, held that the evidence in question was admissible, and ordered the injunction granted to the plaintiff as he had originally prayed, upon the strength of the evidence which had been excluded in the lower court. This sudden reversal of position by the state supreme court left the intervenor in the position of losing his case without having had an opportunity to present evidence to rebut the plaintiff's evidence which had been ruled in the trial court inadmissible. The intervenor filed a motion for rehearing in the state supreme court, but this was denied under a rule of court which provided that only one rehearing should be granted. The intervenor then appealed, by writ of error, to the Supreme Court of the United States, contending that the *action* of the state supreme court amounted to a denial of "due process of law" as to him, in violation of the Fourteenth Amendment. This contention was sustained, in the above decision. It was held that the "act of the state supreme court, done unexpectedly at the end of the proceeding," when the appellant could not get a consideration of his evidence which might rebut his opponent's evidence, amounted to a denial of due process of law as guaranteed by the Fourteenth Amendment. No statute was held unconstitutional, but merely an act of the judicial branch of the state government.

By the above outline of the case of *Saunders vs. Shaw*, it is clearly seen that the constitutional question presented to the Supreme Court of the United States could not possibly have been presented earlier,—because the action of the state supreme court (which act was held unconstitutional) did not

take place earlier. Therefore the case is not in any sense parallel to the case now at bar, and is no authority for allowing Herndon to attack the constitutionality of the statute under which he was indicted after his conviction thereunder had been affirmed by the state supreme court.

Appellant on page 61 of his brief also cites the case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358. In this case the jurisdiction of the United States Supreme Court was questioned because the federal constitutional question was raised first in a motion for rehearing in the state supreme court. The decision holds that the United States Supreme Court had jurisdiction in the appeal because the petitioner could not have made the constitutional point which was considered by the United States Supreme Court until after the decision rendered by the state supreme court. In fact the question actually considered in this decision was "the constitutional validity of the ruling" of the state supreme court. The decision therefore comes within the same category as the case of *Saunders v. Shaw*, supra, being a complaint that the judicial department of the state had denied due process of law to the appellant by a "ruling." See the following language at the close of the opinion in the *Great Northern Railway* case:

> "We have seen that the assault upon the judgment is made along two lines. The first is a challenge to the constitutional validity of the ruling in the *Doney* case, and involves a misconception of the decision in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.* *The second is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the petitioner could not make in advance of the event.*"

In *Grannis v. Ordean*, 234 U. S. 385, which is the only other case cited by appellant on this particular point, it appears that the Federal constitutional question was first presented in the motion for rehearing in the state supreme court,

and that "the state supreme court entertained the petition, considered and overruled the contention that petitioner's rights under the Amendment were infringed, declaring that its decision was to be interpreted as holding against the contention." Since the Federal constitutional question had thus been expressly decided by the state supreme court, it was held that the United States Supreme Court had jurisdiction of an appeal from the ruling.

This decision was therefore directly in line with the decision in *Whitney v. California*, quoted earlier in this division of our argument, wherein it was held that "this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."

FAILURE OF STATE COURT TO DECIDE CONSTITUTIONAL POINT NOT EQUIVALENT TO DECIDING AGAINST IT WHEN BASED UPON LACK OF JURISDICTION

Only one question remains for discussion, under this jurisdictional point: Is the failure of the Georgia supreme court to decide the Federal constitutional point advanced in the motion for rehearing equivalent to ruling against it? Appellant cites on this (on page 61 of his brief) only the case of *Lawrence vs. State Tax Commission*, 286 U. S. 276, 282, as authority for the argument that "a claim of Federal right is denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it."

Inspection of that case shows two important things to be considered: (a) the Federal constitutional point was made by Lawrence in his original suit against the Mississippi Tax Commission to set aside the tax assessment against him (see report of the state supreme court's decision in 162 Miss. 338, 137 So. 503, and page 279 of the United States Supreme Court's decision); and (b) the Mississippi supreme court

did not refuse to pass on the Federal question because of any lack of jurisdiction to do so, but because it held that a decision of the Federal point was unnecessary in view of other grounds upon which it placed its decision. These "other grounds" were held by the Supreme Court of the United States to be *"unsubstantial and illusory"* (page 282-283). And the decision of the Mississippi supreme court was therefore held to be equivalent to deciding against the Federal constitutional point which Lawrence had properly advanced. The decision says: (p. 282.)

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is *properly* invoked. Even though the claimed constitutional protection be denied on non-Federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."

This was vastly different from the situation in the present case, where the Supreme Court of Georgia pointed out that it was "without jurisdiction" (under the constitution of Georgia) to decide the Federal question presented in the motion for rehearing for the reason that this Federal question (being a contention that the statute under which the indictment was returned was violative of the Fourteenth Amendment) had not been presented in the trial court first for determination. There is nothing "unsubstantial and illusory" in that. The decisions which we have previously cited in this division of our brief thoroughly establish that the proper time to raise a Federal question is in the trial court, whenever that is required by the State practice. (*Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 308.)

The provision of the Georgia constitution which limited the jurisdiction of the Georgia supreme court to questions properly raised in the inferior courts of the state (quoted

above in this division of our argument) certainly did not itself violate the "due process clause" of the Fourteenth Amendment. It has been held by the Supreme Court of the United States that a state has the right to determine for itself the courts in which crime may be prosecuted, and the appellate tribunals, if any, to which such causes may be carried. *Rogers v. Peck*, 199 U. S. 425, 434-435.

Therefore, since the refusal of the Georgia supreme court to decide the Federal question advanced by Herndon in his motion for rehearing was based upon *lack of jurisdiction*, which we have shown in this brief was in accordance with the constitution and laws of the State of Georgia, the case is not one where the decision of the state supreme court is equivalent to ruling against the Federal constitutional contention, and the decision in *Lawrence v. State Tax Commission*, supra, is not applicable.

We conclude, therefore, that this appeal should be dismissed, for lack of jurisdiction, because the Federal claim now made was not seasonably presented in the state courts, and has not been passed upon by the state supreme court.

II.

GEORGIA'S STATUTE ON "ATTEMPT TO INCITE INSURRECTION," AS CONSTRUED, DOES NOT VIOLATE THE "DUE PROCESS CLAUSE" OF THE FOURTEENTH AMENDMENT BY UNLAWFULLY INFRINGING LIBERTY OF SPEECH OR ASSEMBLY.

We come now to a discussion of appellant's contention that the Georgia statute, penal code sec. 56, penalizing "Attempt to Incite Insurrection," as construed by the Supreme Court of Georgia, violates the "due process clause" of the Fourteenth Amendment to the Constitution of the United States.

The construction which appellant contends gives to the Georgia statute the tinge of unconstitutionality is set forth in the following language of the Georgia Supreme Court's decision in the *Herndon* case:

"The statute means then that any attempt to induce others to come together in any combined resistance to the lawful authority of the State shall constitute an attempt to incite an insurrection and shall be punishable as stated. It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending. . . . " (178 Ga. 854.)

"Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite. It was the intention of this law to arrest at its incipiency any effort to overthrow the State government, where it takes the form of an actual attempt to incite others to insurrection. . . . " (178 Ga. 855.)

(*On Motion for Rehearing*:) "Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen *at any time within which he might reasonably expect his influence to continue to be directly operative* in causing such action by those whom he sought to induce. . . . " (179 Ga. 600.)

It will be noted that the Georgia statute is not one making any particular utterance criminal, but it penalizes the use of *any language* when used under such circumstances and with such intent as to constitute an actual attempt to incite an insurrection.

Appellant contends, in effect, that the Constitution of the United States guarantees to him the right to use any language he wishes, even though it be used under such circumstances and with such intent as to constitute an actual attempt to incite an insurrection, unless there is a "clear and present danger" of his succeeding in his attempt to incite an insurrection. And since the Georgia statute, as construed by the state supreme court, does not make "probable success" of the insurrectionary attempt an essential ingredient of the offense, appellant contends that the Georgia statute is violative of the federal constitution.

RIGHT OF FREEDOM OF SPEECH NOT UNLAWFULLY ABRIDGED

We could phrase no more forceful language to answer this contention than the following oft quoted words from the decision of the United States Supreme Court in the case of *Gitlow vs. New York*, 268 U. S. 652:

> "That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. *And the immediate danger is none the less real and substantial because the effect of a given utterance can not be accurately foreseen.* The State can not reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale.
>
> "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It can not be said that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extin-

guish the spark without waiting until it has enkindled the flame or blazed into the conflagration. *It can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction;* but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

At this point the *Gitlow* decision (p. 669-670) cites the following language from *People v. Lloyd*, 304 Ill. 23, 136 N. E. 505; 512:

"Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government *without waiting until there is a present and imminent danger of the success of the plan advocated.* If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."

The case of *People v. Lloyd*, supra, which was cited approvingly in more than one place in the *Gitlow* decision, was a conviction in 1920 of thirty-nine members of the Communist Labor party under the Illinois statute which made it an offense for any person "openly to advocate by word of mouth or writing the reformation or overthrow by violence or any other unlawful means of the representative form of government now secured to the citizens of the United States and the several states by the constitution of the United States and the constitutions of the several states," etc. The gist of the ruling, insofar as applicable to the *Gitlow* case and to the case now at bar, is:

(6) "The Legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, *without waiting until there is a*

present and imminent danger of the success of the plan advocated."

Justice Story's work on the Constitution (5th ed.), § 1880, is cited on page 634 of the *Gitlow* decision. On this subject that eminent authority, in expounding the First Amendment which declares: "Congress shall make no law abridging the freedom of speech or of the press," wrote as follows: (§ 1880)

"That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private therefor, is a supposition too wild to be indulged by any rational man. . . . A man might, out of mere malice and revenge, accuse another of the most infamous crimes . . . might inflict the most distressing punishments upon the weak, the timid, and the innocent; might prejudice all a man's civil and political, and private rights; and might stir up sedition, rebellion, and treason even against the government itself, in the wantonness of his passions or the corruption of his heart.

Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassinations and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities.

"It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government."

"DANGEROUS TENDENCY" IS TEST APPLIED IN DECIDING CONSTITUTIONALITY OF STATUTES PENALIZING CERTAIN LANGUAGE

The *Gitlow case* (page 668) also cites approvingly the case of *State vs. Holm*, 139 Minn. 267, 166 N. W. 181 (2), L. R. A. 1918-C, 304. This decision upholds the constitutionality of a Minnesota statute which made it "unlawful for any person to teach or advocate . . . that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States," against the contention that it was violative of section 1 of the 14th amendment to the federal constitution. On this point the *Holm* case declares: (p. 183 of 166 N. W.)

> "To what extent this amendment takes from the States the power to place legislative restrictions upon the freedom of speech and the freedom of the press is still a mooted question; but, conceding that it protects this right from abridgment by the States, the freedom secured thereby is not an unlimited license to speak and to publish whatever one may choose. It is settled that the State may prohibit publications or teachings which are *injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties* without infringing the constitutional provisions which preserve freedom of speech and of the press."

The standard here adopted is *"dangerous tendency."* If the writings or speech have a "dangerous tendency," viewed from the standpoint of governmental and social safety, then the State has a right to penalize such writings and speech without infringing the constitutional right of freedom of speech and press. This same standard was adopted and applied by the Supreme Court of the United States in the following cases in 1919 and 1920, upholding convictions in federal courts of violating the Espionage Act of 1917

against contentions that the right of freedom of speech and press was unconstitutionally abridged:

Debs vs. U. S., 249 U. S. 211.
Abrams vs. U. S., 250 U. S. 616.
Schaefer vs. U. S., 251 U. S. 466.
Pierce vs. U. S., 252 U. S. 239.

"CLEAR AND PRESENT DANGER OF SUCCESS" NOT REQUIRED UNDER THE SUPREME COURT'S RULINGS

Appellant contends that before a person can be penalized for attempting to incite an insurrection by use of words of incitement, it must be shown that there exists a "clear and present danger of the success" of his plan. And in support of this contention he cites the case of *Schenck vs. United States*, 249 U. S. 47. This was an affirmance of a conviction in a federal court of violating the Espionage Act of 1917, in which the decision said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

But in a later part of the *Schenck* decision (page 52), Justice Holmes said something which we can just as well point to as supporting the "dangerous tendency" rule instead of the "clear and present danger" rule:

> "If the act (speaking, or circulating a paper), *its tendency and the intent with which it is done*, is the same, we perceive no ground for saying that success alone warrants making the act a crime."

And in the four cases which followed the *Schenck* case within the course of a year and a half (*Debs*, *Abrams*, *Schaefer* and *Pierce* cases, supra) the Supreme Court absolutely abandoned all reference to any necessity for "clear and present danger," and affirmed the convictions upon the principle of *"dangerous tendency."*

For instance, in the *Pierce case* (252 U. S. 239, 243), one of the points which went up for decision was the contention that the judge erred in refusing to sustain the demurrer, one of the grounds of which was (3rd) "that there was a failure to show a *clear and present danger* that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act." As to this contention the majority of the Supreme Court held, seven to two (Justices Holmes and Brandeis dissenting):

> "Whether the statements contained in the pamphlet had a *natural tendency* to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer, but by the jury at the trial." (page 244.)

Thus the majority of the court ignored the contention that the state of facts did not present a "clear and present danger" as unnecessary even to answer, or else held (in effect) that these words only meant "a natural tendency to produce the forbidden consequences."

The *Gitlow* decision (on p. 671) actually summarizes the *Schenck* case as holding that in the case of a general statute (penalizing a substantive evil without specifying the words declared to be unlawful), "the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if *its natural tendency and probable effect* were to bring about the substantive evil which the legislative body might prevent," (citing *Schenck & Debs* cases). Thus the Supreme Court treated the *Schenck* case, when considered in the same picture with the subsequent *Debs* case, as applying the *dangerous tendency* rule, which, we have pointed out above, has been applied in so many other cases that it has become the established rule.

Likewise, in *Abrams vs. United States* (250 U. S. 616), in which five Russians were convicted under the Espionage Act for distributing pamphlets appealing to "workers" to oppose and resist the government in its war activities, the Court held

(seven to two) that there was no infringement of the constitutional freedom of speech and press, because (page 624) "the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war" and "the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war."

The basis upon which the *Abrams* case was affirmed was the *intent*, as illustrated in the above quotations, disregarding the question whether the case presented any "clear and present danger" of the defendants' plan succeeding.

While Justices Holmes and Brandeis dissented in the *Abrams* case, the dissenting opinion which was written by Mr. Justice Holmes also indicates a departure from the "clear and present danger" rule. For he says, (page 628):

> "But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil *or an intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."

This certainly recognized and admitted that there would not always have to be a "present danger of immediate evil" to warrant a legislative curtailment of freedom of speech and press, but that the *intent* of the inflammatory speaker or writer was sufficient basis for punishing him regardless of whether there was in fact a "present danger" of his succeeding." Mr. Justice Holmes continued as follows in the dissenting opinion in the *Abrams* case: (page 628):

> " . . . Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Pub-

lishing those opinions *for the very purpose of obstructing, however, might indicate a greater danger, and at any rate would have the quality of an attempt.* So I assume that the second leaflet, if published for the purposes alleged in the fourth count, might be punishable."

IN WHITNEY v. CALIF., ENTIRE COURT ACCEPTED DEPARTURE FROM THE "CLEAR AND PRESENT DANGER" RULE

While the cases discussed in the last few pages of this brief (*Debs, Abrams, Schaefer* and *Pierce* cases), were all cases of violating the *Espionage Act,* and therefore involved the principle of resistance to the prosecution of the war, it cannot be said that this fact controlled the trend of the decisions or is responsible for the departure from the "clear and present danger" rule.

The *Gitlow* decision, supra, (268 U. S. 652) was decided in 1925, and the case of *Whitney v. California,* 274 U. S. 357, in 1927. Both of these were State court prosecutions for violations of State criminal syndicalism statutes, in which the appellants contended that the statutes violated the 14th Amendment to the Constitution of the United States by unduly infringing the right of freedom of speech, assembly, etc.

Both the New York and the California statutes in question were upheld by the Supreme Court as constitutional exercise of police power by the States.

While the *Gitlow* case was affirmed by a divided court, seven to two, Justices Holmes and Brandeis dissenting, the *Whitney* case was affirmed without any dissent. Justices Holmes and Brandeis filed a separate opinion concurring in the result, with slightly different argument and reasoning.

The most noticeable thing about the *Whitney* decision, insofar as a present consideration of it is involved, is the fact that both of the opinions rendered in the case (the main opinion and the special concurrence) indicate the acceptance of a departure from or modification of the "clear and present danger" rule of the old *Schenck* case. The main opinion,

filed by Justices Taft, Van Devanter, McReynolds, Butler, Sutherland, Stone and Sanford, declared: (page 371)

> "That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom *by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means,* is not open to question. *Gitlow v. New York,* 268 U. S. 652, 666-668, and cases cited."

(It will be noticed that the test of constitutionality above applied to statutes abridging the freedom of speech is *"dangerous tendency"*—utterances "tending" to "endanger the foundations of organized government," etc.)

And in the special concurring opinion, written by Mr. Justice Brandeis in the *Whitney* case, and concurred in by Mr. Justice Holmes, the following significant language is used: (page 373)

> "... Although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, *or is intended to produce,* a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. See *Schenck v. U. S.,* 249 U. S. 47, 52."

Thus it was definitely stated in this special concurring opinion that if certain speech is used *with intent to bring about a*

clear and imminent danger to the State (such as, for example, an intent to bring about the State's overthrow by violent means), then the speech may be penalized by the State.

This language is remarkably close to the language of the Georgia Supreme Court in denying the motion for rehearing in Herndon's case, wherein it was said :(179 Ga. 600.)

> "Force must have been contemplated . . . but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

In reading the United States Supreme Court decision in the *Whitney* case (274 U. S. 357), and also the California decision which it affirmed (57 Cal. App. 449, 207 P. 698) we see nothing to indicate that there was any evidence of a "clear and present danger" that the defendant and her associates in the Communist Labor Party might succeed in bringing about the revolution which their platform was shown to advocate. The California statute that Miss Whitney was convicted of violating provided that "any person who organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism is guilty of a felony and punishable by imprisonment." (See p. 360 of 274 U. S.)

The evidence against Miss Whitney showed (a) that she joined and participated as a committee officer in a convention held by the Communist Labor party, and (b) that the platform and avowed principles for which the party stood were revolutionary in nature and advocated violence as a means for the proletariat to overthrow the capitalist government. The case, therefore, is quite plainly a parallel to that of Herndon. The Supreme Court's decision in the *Whitney* case (pages 363 to 365 of 174 U. S.) sets forth quotations from the Communist Labor party's platform and literature, showing a remarkable parallel to some of the evidence ad-

duced in the *Herndon* trial. We shall not at this place in our brief discuss the evidence in detail. The point at this time is that the California statute did not limit its application to cases where there was "clear and present danger," nor did the evidence show any "clear and present danger" that the defendant and her associates would succeed in their revolutionary plan. This shortcoming, if it be such, did not prevent the United States Supreme Court affirming the conviction. Therefore the *Whitney* decision is eminent authority for our position that "clear and present danger" is not an essential element of the constitutional test to be applied to State statutes abridging freedom of speech and assembly.

"DANGEROUS TENDENCY" RULE APPLIED BY U. S. SUPREME COURT IN SUSTAINING MINNESOTA STATUTE

Between the time of the *Debs* decision and the *Gitlow* and *Whitney* decisions, there came up for decision the case of *Gilbert v. Minnesota*, 254 U. S. 325. In this case the question was up for consideration as to whether the Minnesota statute making penal "speaking against enlistment" was an unconstitutional infringement upon the right of freedom of speech. The statute being construed was the same one that the Minnesota Supreme Court had already declared constitutional in the case of *State vs. Holm*, 139 Minn. (supra), which as we have pointed out was cited approvingly in the *Gitlow* decision. In this case, likewise, the United States Supreme Court cited approvingly the *Holm* case. (See page 329.) The Supreme Court held that the Minnesota statute did not unlawfully abridge the right of freedom of speech, and *in so doing made no mention whatever of any "clear and present danger" rule.* The decision pointed out and dwelt considerably (pages 332, 333) upon the fact that the evidence indicated that Gilbert's *intent* was the discouragement of enlistment in the army during war time, but the decision pointed out *no "clear and present danger"* that his words

would have any effect of actually obstructing enlistment, but on the other hand seems to have been based upon the fact that the prohibited speech had a "dangerous tendency." This fact is brought out more clearly by inspecting the dissenting opinion of Mr. Justice Brandeis, who expressed the opinion that the statute was unconstitutional because "it abridges freedom of speech and of the press, not in a particular emergency, in order to avert a *clear and present danger*, but under all circumstances. Mr. Justice Holmes did not join in this dissent, but concurred in the result reached by the majority.

HISTORY OF GEORGIA STATUTE SHOWS IT WAS PASSED TO CURB THE SUBSTANTIVE EVIL OF ATTEMPTING TO INCITE PEOPLE TO INSURRECTION. TIME HAS NOT DIMMED OR VARIED THIS EVIL

Appellant's brief, on pages 23 to 39, contains historical citations and argument seeking to point out that the Georgia statute was not aimed at the communist party, and therefore is worthy of no consideration as a legislative finding that conduct and advocacy such as Herndon was engaged in constituted a substantive evil.

While appellant cites historical works to sustain his statement that there were rumors of insurrection among the negroes in Georgia in 1865 and 1866, he cites nothing to show that this was the sole reason for the passing of the insurrection statute in 1866.

As a matter of fact, history shows that there was considerable fear on the part of governmental authorities that the *white people themselves* would break out in renewed civil war, and the Legislature of 1866 was very anxious to be conciliatory to the national government and passed this act as a manifestation of intent to put down any new manifestation of insurrection or the advocacy thereof.

See Vol. I, *Doc. History of Reconstruction* (*Fleming*), page 59, giving extracts from *Report of Joint Committee on*

Reconstruction, 39th Congress, quoting General Grierson as follows:

> "I believe that there is an organization existing now throughout the South for the renewal of the rebellion. Many circumstances or things which have occurred since the surrender make me believe so." (1865)

Appellant cites this congressional committee report and this historical work, on page 35 of his brief. The same historical work, on page 59, quotes the *Carl Schurz report to President Johnson* (1865) as reciting that there were then four classes of people in the South, one class consisting of "the incorrigibles, who still indulge in the swagger which was so customary before and during the war, and still hope for a time when the Southern Confederacy will achieve its independence."

Another well known work, *Reconstruction in Georgia*, by Mildred Thompson, instructor of history at Vassar College (Columbia Univ. Press) on page 163, summarizes the *Carl Schurz Report to President Johnson* as expressing "omens of recurring rebellion and re-enslavement." On page 165, this book points out that "the basis on which Congress acted in enforcing new reconstruction upon the Southern States in 1865 was that they were still in a condition of war." The author then declares that there was in fact no real danger of any new rebellion in Georgia, though there was in some other States.

In this setting then (perhaps combined with appellant's reported rumor of insurrection among the newly liberated slaves) the Georgia Legislature passed the present insurrection statute in 1866.

Coulter's *Short History of Georgia* (cited extensively from page 29 to 37 of appellant's brief) points out, on page 343, that the law which was passed in 1866 providing that "anyone attempting to incite combined resistance through violence against the State should suffer death" was an expression by the State of a willingness to support and maintain the newly constituted authority within the State. Coulter here recites

that by this and other laws passed in 1866 "Georgia felt that she was showing full loyalty to the Union and proper respect to her conquerors, without heaping disgrace upon herself by abandoning the memories of her past heroism."

It is also worthy of note in this connection that Georgia reaffirmed this statute by amending it in December, 1871, specifically making the punishment clause apply to "Attempts to incite insurrection," after the Supreme Court of Georgia had held in *Gibson v. State*, 38 Ga. 571, that the penalty clause was defective. See Acts 1871, page 19.

Thus we see that this statute expresses a legislative finding in 1866 (and reaffirmed in 1871) that attempting to incite people to combined resistance to the lawful authority of the State constituted a sufficient substantive evil to call for an abridgement of freedom of speech in this regard.

It makes no difference whether the Legislature particularly feared an insurrection by white people or an insurrection by negroes. The danger to the State would be just as real, whether the insurrectionists were white or black.

This legislative inquiry and finding made in 1866 and reaffirmed in 1871 is just as true today as it was then. Time has not dimmed its value as a legislative enactment.

There is a remarkable parallel between the recent attempts of the communist party to incite the negroes to seize the land of all white people in the "black belt" and to set up an independent negro nation there, and the attempts which appellant declares in his brief were being made in 1866 to incite the newly liberated slaves to insurrection.

Calling the thing "communism" today doesn't make it any different from the incitements of 1866, if in fact it is similar. A stinkweed by any other name would smell just as bad.

Suppose the Governor of every State had to call his Legislature in special session to pass new laws whenever a new and previously unpenalized weapon or scheme of gangland appeared, instead of utilizing the laws already on the books insofar as the generality of their terms might fit the exigency of the new situation!

We have on the statute books an offense known as "carrying concealed weapons." When this was passed machine-guns were not in existence. Modern invention produced them later. But if a gangster is arrested with a concealed machine-gun and charged with violating that ancient statute against "carrying concealed weapons," it would hardly lie in his mouth to contend that the Legislature had not determined that the carrying of concealed machine-guns was an evil to be prohibited since they had come into existence after the enactment of the statute.

Appellant's attempt to argue around the *Gitlow* decision by his historical recital showing that the present Georgia statute (section 56) was passed in 1866, when the Georgia Legislature could not possibly have had the communists in mind, will avail him naught, for the communists of today have brought themselves under the terms of the Georgia statute of 1866, and the legislative finding that such iniquitous activity was a sufficient menace to society to call for an abridgement of freedom of speech in this respect stands as true today as it did then.

III

THE GEORGIA STATUTE, AS CONSTRUED, IS SUFFICIENTLY DEFINITE AND CERTAIN

Appellant contends that the Georgia statute under which this conviction took place, as construed by the Supreme Court of Georgia, violates the due process clause of the Fourteenth Amendment because of alleged vagueness and uncertainty.

In construing this statute the Georgia Supreme Court held that in order to be guilty of "attempting to incite insurrection" a person must attempt to induce others to join in combined resistance to the lawful authority of the State, and that in so doing *he must intend that force be used.* In further explanation, as to *when* the force must be intended to ensue, the court said:

"Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

This is not vague or indefinite. The statute, as stated and construed, definitely informs a person that he must not attempt to incite others to combined resistance by force to the lawful authority of the State when he intends that such force shall come at some time as a direct result of his influence upon those whom he attempts to incite. Thus *intent to bring about force* as a direct result of his incitement is declared to be a necessary element of the offense.

The statute of the State of Washington, considered and held constitutional in *Fox v. Washington*, 236 U. S. 273, was analogous in many respects to the statute now up for consideration, though the evil there dealt with and penalized did not involve "forceful resistance to the lawful authority of the state" but only "disobedience of law" and "disrespect for law." The Washington statute provided:

> "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or *inciting*, or having a *tendency* to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall *tend to encourage or advocate disrespect for law* or for any court or courts of justice, shall be guilty of a gross misdemeanor."

This statute was attacked, *by demurrer*, as being unconstitutional, and upon conviction Fox appealed to the Supreme Court of Washington, where it was held that the statute was

not violative of the Fourteenth Amendment, that it did not unlawfully abridge freedom of speech, and that it was not bad for uncertainty. (See page 276 of 236 U. S.). The decision of the United States Supreme Court, written by Mr. Justice Holmes, intimates that the statute would have been unconstitutional if it had been construed "to prevent publications merely because they tend to produce unfavorable *opinions* of a particular statute or of law in general," but (quoting Mr. Justice Holmes):

> "We understand the state court by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and *too vague* for a criminal law must fail."

The headnote summarizes the decision as follows:

> "A statute which . . . makes criminal the editing of printed matter tending to encourage and advocate disrespect for law, cannot be said to violate U. S. Const., 14th Amend., as being an unjustifiable restriction of liberty, and too indefinite for a criminal statute, where the highest state court, by implication at least, reads the statute as confined to encouraging an actual breach of the law, and in the case at bar has merely construed it as embracing an article encouraging and inciting a persistence in what would be a breach of the state laws against indecent exposure."

(It will be noted that this decision is relevant also to the preceding division of this brief. There is no mention of any "clear and present danger" that the incitement would be acted upon by the persons encouraged by the article. The decision upheld the statute because it penalized the publishing of articles *encouraging people to commit actual violations of law.* And the law violations involved were not matters that contained any danger of overthrow of the government or forceful resistance to it.)

The decision of the *Fox* case in the Washington supreme

court (71 Wash. 185), cited only one case on the question of alleged vagueness of the statute, to-wit: *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, which held:

> "6. Due process of law is not denied a corporation convicted of violating the Texas anti-trust laws of May 25, 1899, and Mar. 31, 1903, because the legislation permits and the trial court charged that there may be a conviction not only for acts which accomplish the prohibited result, but also for those which *'tend'* or are *'reasonably calculated'* to bring about such result."

In *Nash vs. United States,* 229 U. S. 373, which is cited in *Fox v. Washington,* supra, (236 U. S. on page 277), it was held that "there is no such vagueness in the anti-trust act of July 2, 1890, as to render it inoperative on its criminal side, because only such contracts and combinations are within the act as, by reason of intent, or of the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition, or unduly obstructing the course of trade."

GEORGIA STATUTE MORE DEFINITE THAN THE CALIFORNIA STATUTE WHICH WAS UPHELD

The Georgia statute now being considered is more definite and certain than was the California statute under which Miss Whitney was convicted, and which was sustained in *Whitney v. California,* 274 U. S. 357, 368, against the contention that it was "repugnant to the due process clause by reason of vagueness and uncertainty of definition." The decision recites that she was convicted under Sec. 2, subd. 4, which was as follows:

> "Any person who . . . (4) organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism, is guilty of a felony."

And criminal syndicalism was defined in the act as:

> "Any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

Let this be compared, as to definiteness, with the Georgia statute providing, as construed, that *any person is guilty of a felony who attempts to induce others to join in combined resistance by force to the lawful authority of the State, provided he intends that such force shall come at some time as a direct result of his influence upon those whom he attempts to incite.*

In discussing the contention that the California statute was unconstitutional by reason of vagueness and uncertainty, the decision in the *Whitney* case says that the criminal syndicalism statute "has no substantial resemblance to the statutes held void for uncertainty under the 14th and 5th Amendments in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221, and *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89, because not fixing an ascertainable standard of guilt."

Appellant, on pages 42 and 43 of his brief, quotes at length from the *L. Cohen Grocery Company* and the *International Harvester* cases, above referred to. We feel that the language of the *Whitney* decision is sufficient answer to their citation in the present appeal.

The *Whitney* decision points out that similar criminal syndicalism statutes of other states, some less specific in their definitions than the California statute under consideration, have been held by the state courts not to be void for indefiniteness, the following examples being cited:

State v. Hennessy, 114 Wash. 351, 364.

State v. Laundy, 103 Or. 443, 460.

Peo. v. Ruthenberg, 229 Mich. 315, 325.
Fox v. Washington, 236 U. S. 273, 277.
Peo. v. Steelik, 187 Cal. 361, 372.
Peo. v. Lloyd, 304 Ill. 23, 34.

IV.

THE GEORGIA STATUTE, AS APPLIED IN THIS CASE, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The evidence in this case established the fact that Herndon had come to Atlanta from another state as a paid organizer for the communist party, and that he had no other business or interest in view in coming to Atlanta. The evidence did not show the exact time of his arrival, but it appeared that under a different name he had rented a postoffice box for the reception of mail in Atlanta in September, 1931. He was arrested and indicted in July, 1932. It appeared that during that period of time he had been working up an organization for the party in Atlanta, had actually obtained some members, and had called and conducted some meetings in the interest of furthering the organization. His admissions to the officers covered this much, and the nine membership books (filled out with the names and data of members), (R. 92 et seq) together with the record of various "minutes" of meetings found in the documents under his arm (R., 117, 118, 119) also showed this.

The evidence showed that he had seized upon a condition of employment and unrest in Atlanta to call forth and produce a mass demonstration of unemployed people, white and colored, demanding increased appropriations for "relief" from county authorities. (See documents No. 30 and No. 31, R., 123-125, also his admissions to witness E. A. Stephens concerning them, R., 62-63). He had had 7,500 of the circulars printed at communist division headquarters at Chattanooga, and distributed them in Atlanta. (R., 62-63). These circu-

lars did not advocate force or violence. In them Herndon posed as "the Unemployed Committee of Atlanta, P. O. Box 339" (Herndon's box.)

The jury was authorized to find, from the circumstantial evidence as a whole, that Herndon's distribution of above circulars and his inspiring of the mass demand, was not being done through any interest in helping such unemployed persons but merely as a means to an end, to-wit: furthering the organization of the communist party which he was paid to organize. Evidence authorizing the jury to reach this conclusion consisted of (a) the proof that the purpose of his coming to Atlanta was not to take part in any local enterprise or business but to work up an organization for the communist party, for which he was being paid; (b) the minutes of the meetings he had held; (c) Document No. 29, a copy of the Daily Worker, issue of July 8, 1932, the central organ of the communist party of the U. S. A. (R. 122A) with an article on page 6 of said newspaper (R. 122-B) entitled "Everything is Peaches Down in Georgia," that plainly showed that the activities of Herndon in inspiring the mass demonstration by means of his circulars under the nom-de-plume of "unemployment committee" was a mere communist activity to focus public discontent into mass action; and (d) the contents of the other documents found in the box under Herndon's arm when he was arrested showing that the stirring up of such mass demonstrations was part of the regular orders of the communist party to its organizers. (See, for example, R., 108, middle of page.)

The above mentioned circulars are not the basis of the case against Herndon. They are, however, a part of the evidence, to be considered along with the whole of the evidence, in arriving at the real purpose and plan of Herndon to incite an insurrection. The jury were authorized to find that his chief objective was to press the cause of the communist party, and that his agitations with reference to local conditions were not the result of any particular interest in local welfare but were pursued merely as a method of fomenting a state of discontent and unrest as a goodly premise for his party pro-

gram. The jury, on seeing that his principal mission was to spread the doctrine of the communist party, could weigh the other circumstances in the light of this fact. In view of it, the documents found in his possession assumed an added significance, and the use to which the defendant applied them became an easier question for solution by the jury. Were not these documents and membership books the tools to be used by the defendant in the execution of his mission? Did he remain in Atlanta for about a year as a paid organizer for the Communist party without using them? He told the officers that he was sent to Atlanta as a paid organizer for the communist party, and that the literature was sent to him from the headquarters of this party in New York City. See testimony of Officer Watson (R. 57).

HIS DUTIES AS ORGANIZER OUTLINED

Shortly after his arrest he was taken before Mr. E. A. Stephens, assistant solicitor general, who testified as follows: (R. 61-62) "He stated that he came from Lexington, Kentucky, where he was an employee of some coal mine company, he stated that a man by the name of E. Doran came there and got him interested in the Communist Party, and that he joined the Nation Communist Party at Lexington, Kentucky, . . . he stated that he was sent to Atlanta to take the position of Organizer for the Communist Party; . . . he stated he was paid $10 a week, sometimes in cash and sometimes in money orders. At that time he stated to me that his duties were, as organizer for the Communist Party, to call meetings, educate or disseminate information regarding the party at these meetings, to distribute literature, to secure members for the organization and generally to work up an organization of the Communist Party in Atlanta. . . . He said he had held or attended two meetings, and then later when questioned about where they were held he designated the meeting places of three meetings that he had called and had been held . . . he did give me the names of persons that he said were members of the organization, said he only have (had) five or six actual

members at that time—actual members, as he put it—said the meetings were sometimes in vacant houses and sometimes in private houses . . . he made these statements to me freely and voluntarily. I want to state further, among the other things he said in talking to me about the quantity of literature here in the suitcase and in the grip, a part of which you will notice has been taken out of the wrapper—there are several packages like this—in questioning him what this was sent to him for, he stated for distribution at his meetings, the same with reference to many of the books that he had in these two receptacles there . . . he said that he called the meetings; and held them and conducted the meetings; as to whether he said he made any speeches at any of these meetings, I don't know that the word 'speech' was used."

Other evidence was introduced which showed that the defendant had induced others to become members of the Communistic Party, about twelve in all. What purported to be minutes of three meetings were also found in the defendant's possession. Some of the minutes made reference to "section committees," and from the evidence as a whole the jury were authorized to find that the phrase "section committee," like the term "unemployed committee," was a designation applied to a subordinate division of the Communist Party. In his statement to the jury he denied none of the testimony to which reference has been made, and made no explanation or statement whatsoever with regard to the literature.

ALL MEMBERS MUST FOLLOW INSTRUCTIONS FROM INTERNATIONAL HEADQUARTERS

Among the documents, found in a box under Herndon's arm at the time of his arrest (R., 92), were nine "Membership Books . . . of the Communist Party of the U. S. A.," containing the names of persons "admitted" to the party in Atlanta. These books also contained what purported to be "extracts from the Statutes of the Communist Party of the U. S. A.," some of which were as follows: "A member of the Party can be every person from the age of eighteen up

who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the comintern and of the party, and regularly pays his membership dues. . . . The Communist Party, like all sections of the comintern, is built upon the principle of democratic centralization. These principles are: . . . Regular reporting of the party committees to their constituents. *Acceptance and carrying out of the decisions of the higher party committees* by the lower, strict party discipline, and immediate and exact applications of the decisions of the executive committee of the Communist International and of the Central Committee of the Party. . . . The basis of the party organization is in the nucleus (in factories, mines, shops, etc.) which all party members working in these places must join. The nucleus consists of at least three members. Newly organized nuclei must be endorsed by the leading committee of the Section in which the shop nuclei are organized. . . . The strictest party discipline is the most solemn duty of all party members and all party organizations. The decisions of the CI and the party convention of the CC and of all leading committees of the party must be promptly carried out. Discussion of question over which there has been differences must not continue after the decision has been made."

In the same membership books we find the following question and answer: "What is the Communist Party? The party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the *revolutionary theory of Marxism* and representing the general and lasting interests of the whole of the working class. The party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. (From the program of the Communist International). We are the party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class)

should work under the guidance of our party, should create the closest contacts with our party. (Lenin). He who weakens no matter how little the iron discipline of the party of the proletariat (especially during the period of dictatorship), effectually helps the bourgeoise against the proletariat (Lenin.)"

The authenticity of the literature was effectually admitted by the defendant, and thus no reasonable question can be raised in this case as to the reality of its apparent source, whether it purports to be an expression from the New York headquarters or from the main party organization, wherever located. The defendant himself was admittedly a member of the party, and he showed that he was connected with a "party Committee."

PLAN OF THE COMMUNIST PARTY IN THE "BLACK BELT"

One of the documents was a booklet entitled *"The Communist Position on Negro Question."* (R., 102-111). On the outside cover was a map of the United States, under which was the following: *"Self Determination for the Black Belt."* The map had a dark belt across it, beginning with a portion of Arkansas and Louisiana, and extending generally eastward through the States of Mississippi, Alabama, Florida, and Georgia, and thence up the coast through several States. The belt included about two-thirds of the State of Georgia. On page 28 of the pamphlet appeared the following: "In the South, the fight must be fearlessly developed against the thievery and robbery of the Southern capitalists and landlords; against their whole system of enslaving the Negroes based on Jim-Crowism and lynch terror. We must fight there not merely against inequality, but against the whole system by which this inequality is enforced. In the first place, our demand is that the land of the Southern white landlords, for years tilled by the Negro tenant farmers, be *confiscated and turned over to the Negroes.* This is the only way to insure economic and social equality for the tenant farmers. Sec-

ondly, we propose to *break up the present artificial state boundaries* established for the convenience of the white master class, and to establish the state unity of the territory known as the *'Black Belt,'* where the Negroes constitute the overwhelming majority of the population. Thirdly in this territory, we demand that the Negroes be given the complete right of self-determination; *The right to set up their own government* in this territory and the right to *separate,* if they wish, from the United States. Around these demands for the Negroes, as I have outlined them here with the *revolutionary* white workers in the very fore-front of the struggle—the unity of white workers, small farmers and the negro masses must be established.. *Not promises: but action.*"

The matter last quoted appeared to be an extract from a speech nominating a candidate for vice-president of the United States on the communist ticket for 1932; but it appeared in a pamphlet entitled "The Communist Position on the Negro Question," and came to the defendant with the express approval of the party headquarters in New York, as shown by the foreword on the first page of the booklet (see R., 104), reciting:

> "The documents presented in this pamphlet are the result of the very best and most careful thought, study and experience of our Party. The correct line of our Party on this question has been hammered out in years of bitter struggle—struggle with the enemies of Bolshevism. . . . But in the furious struggle against our enemies . . . our Party has hammered out its Bolshevik line on the negro question."

Referring to this and the other communist literature introduced in evidence Officer Watson testified: (R. 57.)

> "He told us they were sent to him from headquarters of this Communist Party in New York."

The nominating speech quoted as above is especially relevant as an explanation of what was meant by the slogan: *"Self Determination for the Black Belt"* which was shown to

be carried in the title lines of the "Daily Worker," the daily newspaper of the communist party (R. 122A); on the back of their campaign-fund subscription certificates (R. 100A); and in various other places in the literature. It also showed, together with the above widely-used slogan, that the Communist Party of the U. S. A. was *obeying* or *following* the instructions of the international headquarters of the communist party (in Russia), which we will now quote:

TEXT OF THE COMMUNIST INTERNATIONAL ORDERS TO THE AMERICAN COMMUNIST PARTY

This pamphlet which carried the map of the *"Black Belt,"* also contained the following: (R., 104-109) *"Resolutions of the Communist International on the Negro Question in the United States.* 1 . . . The struggle of the Communists for the *Equal Rights* of the Negroes applies to all Negroes, in the North as well as in the South. The struggle for this slogan embraces all or almost all of the important special interests of the Negroes in the North, but not in the South, where the main Communist slogan must be: *The Right of Self-Determination of the Negroes in the Black Belt.* These two slogans, however, are most closely connected. The Negroes in the North are very much interested in winning the right of self-determination of the Negro population of the Black Belt and can thereby hope for strong support for the establishment of true equality of the Negroes in the North. In the South the Negroes are suffering no less, but still more than in the North from the glaring lack of all equality; for the most part the struggle for their most urgent partial demands in the Black Belt is nothing more than the struggle for their equal rights, and only the fulfillment of their main slogan, the right of self-determinaton in the Black Belt, can assure them of true equality. . . . It is the special duty of the *revolutionary Negro Workers* to carry on tireless activity among the Negro working masses to free them of their distrust of the white proletariat and draw them into the common front of the *revolutionary class struggle* against the bour-

geoisie. The slogan of the right of self-determination occupies the central place in the liberation struggle of the Negro population in the Black Belt against the yoke of American imperialism. But this slogan, as we see it, must be carried out only in connection with other basic demands. Thus, there are three basic demands to be kept in mind in the Black Belt, namely, the following: (a) *confiscation of the landed property of the white landowners and capitalists for the benefit of the Negro farmers.* The landed property in the hands of the white American exploiters constitutes the most important material basis of the entire system of national oppression and serfdom of the Negroes in the Black Belt. More than three-quarters of all Negro farmers here are bound in actual serfdom to the farms and plantations of the white exploiters by the feudal system of 'share cropping.' Only on paper and not in practice are they freed from the yoke of their former slavery. The same holds completely true for the great mass of black contract laborers. Here the contract is only the capitalist expression of the chains of the old slavery, which even today are not infrequently applied in their natural iron form on the roads of the Black Belt (chain gang work). These are the main forms of present Negro slavery in the Black Belt, and no breaking of the chains of this slavery is possible without *confiscating* all the landed property of the white masters. Without this *revolutionary measure,* without the *agrarian revolution,* the right of self-determination of the Negro population would be only a Utopia or, at best, would remain only on paper without changing in any way the actual enslavement. (b) *Establishment of the State unity of the Black Belt.* At the present time this Negro Zone—precisely for the purpose of facilitating national oppression—is artificially split up and divided into a number of various states which include distant localities having a majority of white population. If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one government unit all districts of the South where the majority of the settled population consists of Negroes. Within the limits of this State there will of

course remain a fairly significant white minority which must submit to the right of self-determination of the Negro majority. There is no other possible way of carrying out in a democratic manner the right of self-determination of the Negroes. Every plan regarding the establishment of the Negro state with an exclusively Negro population in America (and of course still more exporting it to Africa) is nothing but an unreal and reactionary caricature of the fulfillment of the right of self-determination of the Negroes, and every attempt to isolate and transport the Negroes would have the most damaging effect on their interests. Above all, it would violate the right of the Negro farmers in the Black Belt not only to their present residences and their land, but also to the land owned by the white landlords and cultivated by Negro labor. (c) *Right of self-determination.* This means complete and unlimited right of the Negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States. It would not be right of self-determination in our sense of the word if the Negroes in the Black Belt had the right of self-determination only in cases which concerned *exclusively* the Negroes and did not affect the whites, because the most important cases arising here are bound to affect the whites as well as the Negroes. First of all, true right to self-determination means that the Negro majority and not the white minority in the entire territory of the administratively united Black Belt exercises the right of administrating governmental, legislative, and judicial authority. At the present time all this power is concentrated in the hands of the white bourgeoisie and landlords. It is they who appoint all officials, it is they who dispose of public property, it is they who determine the taxes, it is they who govern and make the laws. Therefore, the *overthrow of this class rule* in the Black Belt is unconditionally necessary in the struggle for the Negroes' rights to self-determination. This, however, means at the same time the *overthrow of the yoke of American imperialism* in the Black Belt on which the forces of the local white bour-

geoisie depend. Only in this way, only if the Negro population of the Black Belt wins its freedom from American imperialism even to the point of deciding *itself* the relations between its country and other governments, especially the United States, will it win real and complete self-determination. One should *demand* from the beginning that *no armed forces of American imperialism should remain on the territory of the Black Belt.* . . . As stated in the letter of the Political Secretariat of the E. C. C. I. of March 16, 1930, the Communists must unreservedly carry on the struggle for the self-determination of the Negro population in the Black Belt in accordance with what has been set forth above. It is incorrect to say that the Communists are only to carry on propaganda or agitation for the right of self-determination, but not to develop any activity to bring this about. No, it is of the utmost importance for the Communist party to reject any such limitation of its struggle for this slogan. Even if the situation does not yet warrant the raising of the question of uprising, *one should not limit oneself at present to propaganda for the 'Right of Self-Determination,' but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc.* . . . It would be a mistake to imagine that the right of self-determination slogan is a truly *revolutionary* slogan only in connection with the demand for complete separation. The question of power is decided not only through the demand of separation, but just as much through the demand of the *right* to decide the separation question and self-determination in general. A direct question of power is also the demand of confiscation of the land of the white exploiters in the South, as well as the demand of the Negroes that the entire Black Belt be amalgamated into a State unit. Hereby, every single fundamental demand of the liberation struggle of the Negroes in the Black Belt is such that if once thoroughly understood by the Negro masses and adopted as their slogan it will lead them into *the struggle for the overthrow of the power of the ruling bourgeoisie, which is impossible without such revolutionary struggle.* One can not deny that it is just possible for the Negro population of the Black Belt to win the right to self-

determination during capitalism; but it is perfectly clear and indubitable that this is possible only through successful *revolutionary struggle* for power against the American bourgeoisie, through *wresting* the Negroes' fight of self-determination from American Imperialism. Thus, the slogan of right to self-determination is a real slogan of *National Rebellion* which to be considered as such need not be supplemented by proclaiming struggle for the complete separation of the Negro zone, at least not at present. . . . It is particularly incumbent on Negro Communists to criticize consistently the half-heartedness and hesitations of the petty-bourgeois national-revolutionary Negro leaders in the liberation struggle of the Black Belt, exposing them before the masses. . . . Simultaneously, Negro Communists must carry on among the Negro masses an energetic struggle against nationalist moods directed indiscriminately against all whites, workers as well as capitalists, Communists as well as imperialists. Their constant call to the Negro masses must be: *Revolutionary struggle against the ruling white bourgeoisie, through a fighting alliance with the revolutionary white proletariat.*"

ADVOCATED SMASHING THE NATIONAL GUARD, THE C. M. T. C. AND R. O. T. C.

The evidence also included a document entitled "*An Appeal to Southern Young Workers.*" (R., 112-113.) Following are some of the statements contained in this document: "The Young Communist League is the champion not only of the young white workers but especially of the doubly-oppressed Negro young workers. The Young Communist League fights against the whole system of race discrimination and stands for full racial, political, economic and social equality for all workers. . . . The Young Communist League is a section of the Young Communist International, the revolutionary leader of the young workers the world over and accepts the guidance of the Communist party of America. The Young Communist League fights for: . . . *Full political, social and racial*

equality for the negro worker. . . . Smash the National Guard, the C. M. T. C. and R. O. T. C."

Still another document was one entitled *"Party Organizer,"* and containing a number of articles on the Communistic party, on what it advocates, and particularly on the manner of organizing workers. (R., 113.)

In his statement to the jury the defendant said in part (R., 78): "We know the system we are living under is on the verge of collapse; no matter what system we are living under, it has developed to its highest point and comes back . . . for instance, you can take a balloon and get so much air in it, and when you get too much it bursts; so with the system we are living under . . . of course, I don't know whether that is insurrection or not, but the question, it has developed to its highest point."

The defendant here apparently expressed the view that a crisis was impending. Did this statement not indicate a belief that the conditions were opportune for a revolution or insurrection, and that now or soon, would be a seasonable time to strike? We repeat that the case does not turn alone upon the direct evidence that circulars advocating unemployment relief were distributed. It must not be overlooked that the defendant was an organizer and induced a number of persons to become members of the Communist party, the purpose and intent of which are thoroughly illustrated by the documentary evidence from which we have quoted. The establishment of the "Black Belt" by peaceful and thorough lawful processes could not have been reasonably anticipated. It called for "breaking up State lines" with even the right of secession from the present national government. The literature fairly teems with such expressions as "confiscation," "revolution," "rebellion," and "violence," even distinguishing a "reformation" and advocating an "uprooting" in its stead. The jury were amply authorized to infer that violence was intended, and that the defendant did attempt to induce others to combine in such resistance to the lawful authority of the state.

HERNDON WAS AIDING THE COMMUNIST PARTY IN ITS UNLAWFUL ATTEMPT TO INCITE INSURRECTION.

This case against Herndon was based not solely upon any particular speech, writing or advocacy by Herndon himself, but upon the fact that he was proven to be aiding and abetting the Communist party in its unlawful attempt to incite insurrection—Herndon being actively engaged as an organizer for the party and having conducted meetings and solicited and obtained members for it.

The evidence makes out a case against the Communist party as principal in the first degree and against Herndon as principal in the second degree. The principal in the first degree is he who fires the shot (in murder, for example), while the principal in the second degree may fire no shot but is present aiding and abetting in the crime.

The Communist party was shown by its authentic literature to be engaged in active attempt to incite revolution among the negroes of the black belt, attempting to incite them to seize all land in the black belt belonging to white people, to abolish present state borders and to set up a new negro state or republic (or soviet) out of parts of Georgia and other states.

Beginning with page 52 of his brief, appellant argues that the words "revolution," "rebellion," "smash," and numerous other violent expressions contained in the Communist documents found on Herndon's person *might* be so construed as to mean a peaceful or bloodless revolution, etc., and that the announced plan of the Communist party as to setting up a negro state or nation in the "black belt" *might* be accomplished by peaceable means, *i. e.*, that the white people and the states involved *might* give up their land to the negroes peacefully and in that event the aims of the Communist party in this regard would be accomplished without force. On page 53 he even argues that "secession" of the black belt from the rest of the United States "might be accomplished peacefully." And concerning all of the "revolutionary" statements contained in the Communist literature he says: "Considered in

their setting, it is quite clear that the remarks quoted in the statement did not constitute advocacy of the use of violence against lawful authority."

For light upon the question thus raised as to the construction that should be placed upon the statements in the Communist literature found under Herndon's arm, let us turn to well-known and authentic public documents and historical data. In appellant's brief he cites several score of non-judicial citations, including newspapers, histories, legislative reports, semi-official reports, etc. We shall therefore cite the following to show that the "peaceable construction" (suggested in appellant's brief) is not the proper construction of the language used, but that the Communist party stands for *force and violence* and is actively engaged in *attempting to incite a revolution*:

FISH COMMITTEE REPORT IN 1931 UNBARED THE COMMUNIST ATTEMPTS TO INCITE REVOLUTION

House of Representatives Report No. 2290, 71st Congress, known as the *Fish Committee report,* contains ample data showing positively what the Communist party is trying to do. The report summarizes the situation as follows, on page 15:

> "The Communist party only uses the election laws to place its candidates on the ballot, in order to conduct open campaigns for their revolutionary principles. It advocates the overthrow of the Government by direct means, through *force and violence,* and despises the evolutionary method of democratic governments. It seeks to destroy our republican form of government, guaranteed by the Constitution, and to set up a dictatorship of the proletariat."

The Report quotes the acceptance speech of W. Z. Foster, Communist candidate for president of the United States, in 1928, as follows:

> "Our party, different from the Socialist party, creates no illusions amongst the workers that they can vote their

way to emancipation, that they can capture the ready-made machinery of the State and utilize it for the emancipation of the working class. On the contrary, we must utilize this campaign to carry on widespread and energetic propaganda to teach the workers that the capitalist class would never allow the working class peacefully to take control of the state. That is their strong right arm and they will fight violently to the end to retain it. The working class must *shatter* the capitalist state. It must build a new state, a new government, a workers' and farmers' government, *the soviet government of the United States.* . . ."

The Report quotes the following (on page 15) from the published program of the Communist party at its 6th world congress at Moscow in 1929:

"The Communists consider it unworthy to dissimulate their opinions or their plans. They proclaim openly that their designs can only be realized *by the violent overthrow of the entire traditional social order.*"

In accordance with this "openness" about the Communist plans, "Candidate W. Z. Foster" came before the Fish Committee and boldly made the following admissions, as set forth on page 11 of the Report:

"The Chairman: Do the Communists in this country advocate world revolution?

"Mr. Foster: Yes; the Communists in this country realize that America is connected up with the whole world system, and the capitalist system displays the same characteristics everywhere . . . everywhere it makes for the misery and exploitation of the workers . . . and it must be abolished, not only on an American scale but on a world scale.

"The Chairman: So that they do advocate world revolution; and do they advocate revolution in this country?

"Mr. Foster: I have stated that the Communists advocate the abolition of the capitalist system in this

country and every other country; that this must develop out of the *sharpening of the class struggle* and the struggle of the workers for bread and butter."

* * *

"*The Chairman:* They are opposed to our republican form of government?

"*Mr. Foster:* Most assuredly.

"*The Chairman:* And they desire to overthrow it through revolutionary methods?

"*Mr. Foster:* I would like to read from the program of the Communist International at this point. . . . 'The conquest of power by the proletariat *does not mean peaceful capturing of ready-made bourgeois state machinery by means of a parliamentary majority.* The bourgeoisie resorts to every means of violence and terror to safeguard and strengthen its predatory property and political domination. Like the feudal nobility of the past, the bourgeoisie can not abandon its historical position to the new class without a desperate and frantic struggle; hence the violence of the bourgeoisie can only be suppressed by *the stern violence of the proletariat.*'"

The above interesting colloquy continues to the point where Mr. Foster admits that the Communists "owe no allegiance" to the flag of the United States, for the reason that they term it a "capitalist flag." He also admits that the Communists of America "look upon the Soviet Union as their country." On page 9 the Fish Report says:

> "The Communists of the United States openly admit their allegiance to the Communist International at Moscow, and glory in the fact that they obey all the orders issued from there immediately and implicitly."

COMMUNISTS' ADVOCACY OF FORCE AND VIOLENCE LONG ADMITTED

The Report points out on page 5 that the *Communist Manifesto*, by Karl Marx, originally written in 1848 and reaffirmed by the Communist party from time to time since, contains the following:

> "Communists scorn to hide their views and aims. They openly declare that their purpose can only be achieved by the *forcible overthrow* of the whole extant social order. Let the ruling classes tremble at the prospect of a *Communist revolution.*"

And the Fish Report quotes on page 65 the following from a 500-page *Report to the Senate,* by Hon. Charles Evans Hughes, in his capacity as Secretary of State, on Jan. 21, 1924:

> "It will be seen that the question of whether the Communist programs contemplate the use of force and violence has been passed upon by every class of tribunal which could pass upon it, namely, Federal and State courts, administrative tribunals and legislative committees of both Federal and State governments, and in every class the result has been in support of the position that *force and violence are inseparable from Communist programs.*"

We have not at hand a copy of the above *Report to the U. S. Senate,* but we respectfully suggest that this Court call for a copy, particularly to procure the list (referred to above) of decisions of "Federal and State courts, administrative tribunals and legislative committees," establishing that "force and violence are inseparable from Communist programs." We presume that some of the court cases referred to are along the following lines:

In People v. Taylor, 187 Cal. 378, 203 P. 85 (1921), the defendant was convicted under two counts of an indictment charging violation of the criminal syndicalism act, and the first count (under which the conviction was affirmed by the California supreme court) charged that the defendant did "knowingly belong to an organization advocating sabotage," etc. The organization involved was the Communist Labor party, and the finding was therefore that this party advocated sabotage.

A similar finding was made in *People v. Whitney,* 57 Cal. App. 449, 207 P. 698 (1922), which is the case that was

carried to the United States Supreme Court and affirmed in *Whitney v. California*, 274 U. S. 357.

In *People v. Lloyd*, 304 Ill. 23, 136 N. E. 505 (1922), it was held that the evidence sufficiently established that the Communist Labor party advocated overthrow of the government by "force, violence and bloodshed." It was pointed out that the Communist Labor party "stood by the principles of the Communist International formed at Moscow." See particularly headnotes 34, 35 and 60.

In *Com. v. Lazar*, 103 Pa. Super. 417, 157 A. 701 (1931), it was held that "Evidence supported conviction for sedition on ground that language used by defendant advocated *revolution by Communists* as minority party."

In *State v. Boloff*, ... Ore. ..... 4 P. 2nd, 326 (12), (1931), it was held that "the proof with much cogency indicates that the Communist party (of the U. S. A.) *taught and advocated the use of violence, crime and sabotage* on proper instrumentalities in the winning of industrial and political ends." This decision gives extracts of the same Communist membership books that were introduced in the Herndon trial, as well as other Communist pronouncements and manifestoes.

In Lenin's Complete Works, Vol. Xviii, Page 361, the following definition of "dictatorship of the proletariat" is given:

> "The dictatorship of the proletariat is nothing else than power based upon force and limited by nothing . . . by no kind of law and absolutely no rule."

CASE OF FISKE v. KANSAS DID NOT CONTAIN EVIDENCE THAT I. W. W. ADVOCATED FORCE AND VIOLENCE

Appellant cites the case of *Fiske v. Kansas*, 274 U. S. 380, where it was held that the Kansas criminal syndicalism statute as applied violated the due process clause of the Fourteenth Amendment. But the gist of that decision was that the evidence did not show that the I. W. W. advocated force or vio-

lence as a means of accomplishing its announced political and industrial aims. See the following, pages 386-387:

> ". . . And it is not as if the preamble were shown to have been followed by further statements or declarations indicating that it was intended to mean, and to be understood as advocating, that the ends outlined therein would be accomplished or brought about by violence or other related unlawful acts or methods."

The present case is plainly distinguishable because the documents and declarations of the Communist party, for which Herndon was proven to be an organizer, teemed with proof that the party advocated force and violence as a means of accomplishing its aims.

Appellant also cites *Stromberg v. California*, 283 U. S. 359. But this case was reversed because the California statute authorized conviction for displaying a red flag or banner "as a sign, symbol or emblem of opposition to organized government," and the Supreme Court held that this clause was capable of being construed to include the "peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high-minded and patriotic, which did not agree with the one in power" (page 369). And "it might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations." It was therefore held that this clause was "repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

In the present case, the Georgia statute is subject to no such criticism as above, and neither has it been applied to any conduct which was "peaceful and orderly opposition to government by legal means and within constitutional limitations."

CONCLUSION

Since Herndon was actively engaged as an organizer in furthering the cause of the Communist party, which was shown to be engaged in attempting to incite an insurrection

and openly advocating force and violence as a means of accomplishing its ends, there was no violation of the constitutional rights under the Fourteenth Amendment in applying to the defendant's case the Georgia statute, nor is the statute unconstitutional.

However, in this appeal, the question of alleged unconstitutionality has not been seasonably presented in the state courts, nor decided there, and the appeal should therefore be dismissed.

Respectfully submitted,

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Atlanta, Georgia,
April 2, 1935.